IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MELVYN P. SALUCK	:	CIVIL ACTION
	:	
v.	:	
	:	
STEVEN ROSNER, HEAVEN SENT, LTD. and CATHY ROSNER, jointly, severally, and in the alternative	:	NO. 98-CV-5718

MEMORANDUM AND ORDER

J. M. KELLY, J. **JANUARY 5, 1999**

Presently before the Court is Defendants' Motion for Stay Pending Arbitration (Document No. 2), in which Defendants also ask the Court to find there is no personal jurisdiction in this case and deny both Plaintiff's request to appoint a receiver (Document No. 5) and Plaintiff's motion for the disqualification of defense counsel (Document No. 6). In consideration of these motions, the Court finds the parties earlier agreed to submit this type of dispute to arbitration and will grant Defendants' motion for a stay of the proceedings. The Court further finds Plaintiff has failed to establish equitable relief is appropriate here, and, in light of the stay of proceedings, will dismiss without prejudice all other motions.

Messrs. Saluck and Rosner are the officers of Heaven Sent Ltd., with Mr. Saluck serving as executive vice-president and treasurer and Mr. Rosner acting as president and secretary. Both men also worked for Heaven Sent: Mr. Saluck was the company's accountant and Mr. Rosner apparently manages the company's operations. Of particular relevance to these motions is the shareholders agreement into which Messrs. Saluck and Rosner entered in October 1994, by which Mr. Saluck became a minority owner of the company. The agreement allows Messrs. Saluck and Rosner to recover expenses they incur in connection to the business (Shareholder

Agreement ¶ 14(b)) and establishes mechanisms for the resolution of disputes between Messrs. Saluck and Rosner that arise from the operation or management of the company, id. ¶ 15. Specifically, the agreement states:

> Except as expressly provided in subparagraphs (a) [relating to delivery of stock] and (b) [relating to violations of the non-competition provisions] above in this Section 15, and except for enforcement of the Note in accordance with its confession of judgment provisions, if any dispute should arise between the parties hereto as to the meaning, effect, performance, enforcement or other issue in connection with this Agreement, which dispute cannot be resolved by the parties, the dispute shall be decided finally by a panel of three arbitrators.

Id. ¶ 15(c).

Within the last year or two Plaintiff has observed what, if proven to be true, amounts to Mr. Rosner's gross mismanagement of the business. Plaintiff alleges that Mr. Rosner misappropriated company funds, both on his behalf and his wife's, treated Plaintiff unfairly in his capacity as a Heaven Sent employee, and acted arbitrarily and fraudulently as company president. Plaintiff therefore has sued Mr. Rosner, his wife, and Heaven Sent, seeking compensatory and injunctive relief. Plaintiff did not bring these grievances to an arbitration panel, but sued Defendants in the U.S. District Court for the District of New Jersey. The matter was transferred to this district by Order of U.S. District Judge Irenas on October 21, 1998.

A. Defendants' Motion to Stay the Proceedings Pending Arbitration.

Defendants seek to have this action stayed pending resolution by an arbitration panel, which they believe is the course prescribed by paragraph 15(c) of the Shareholder Agreement. Plaintiff responds that, in reliance on principles of construction such as in pari materia and ejusdem generis, the language of this provision is very narrow in scope. Based upon its reading of paragraph 15(c), Plaintiff urges the Court to permit the litigation to proceed here.

Plaintiff's argument is totally unpersuasive. A court's primary function in interpreting a

contractual provision is to give effect to the parties' objectively manifested intent, and to accomplish this a court first should turn to the words in the contract. Windsor Sec., Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 667 (3d Cir. 1993). A court should resort to methods of interpretation, such as principles of statutory construction, only if those words are ambiguous. See Mellon Bank, N.A. v. Aetna Bus. Credit, 619 F.2d 1001, 1010-11 (3d Cir. 1980) (quoting United Refining Co. v. Jenkins, 189 A.2d 574, 580 (Pa. 1963)). In this case, there is no ambiguity; the arbitration provision is written in clear, direct language. Under the plain words of paragraph 15(c), except in two specific situations, the parties agreed to have an arbitration panel settle their disputes concerning the business. Further, there can be no serious disagreement that the parties intended paragraph 15(c) to cover complaints like the ones Plaintiff presents here. The expansive language of that provision covers conflicts regarding the "meaning, effect, performance, enforcement or other issue in connection with this Agreement." Accordingly, the Court concludes that under the Shareholder Agreement the parties intended to submit this type of dispute to arbitration, and Defendants' motion to stay the proceeding pending resolution by an arbitration panel is granted. Cf. Becker Autoradio v. Becker Audioradiowerk GmbH, 585 F.2d 39, 44-45 (3d Cir. 1978) (quoting Hussey Metal Div. v. Lectromelt Furnace Div., 471 F.2d 556, 558 (3d Cir. 1972), for the proposition that any doubts as to whether a particular dispute falls within an arbitration provision generally should be resolved in favor of arbitration).[1]

B. Plaintiff's Motion For The Appointment Of A Receiver And Request For Other Injunctive Relief.

Plaintiff requests that the Court appoint a receiver and grant other injunctive relief,

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[1]The Shareholders' Agreement also specifies that Pennsylvania law will apply to the resolution of any dispute arising from the agreement, (Shareholders' Agreement ¶ 16), and therefore the Court will rely on Pennsylvania law in the analysis that follows.

including dissolving the company, invalidating past board action and prohibiting future board action, and preventing Mr. Rosner from drawing a salary or being reimbursed for expenses. He argues a receiver is necessary to avoid further waste of corporate assets and his further oppression as a minority shareholder. Defendants counter that the business continues to thrive and would be stigmatized by the appointment of a receiver. Plaintiff also claims the requested injunctive relief is appropriate because Mr. Rosner has abused his power as majority shareholder, which Defendants dispute with Mr. Rosner's affidavit, in which he claims Plaintiff actually participated in many of the decisions about which he now complains.

The Court will address Plaintiff's request for a receiver first. Defendants correctly point out that the appointment of a receivership of a solvent corporation is a drastic remedy. Tate v. Philadelphia Transp. Co., 190 A.2d 316, 321 (Pa. 1963). A court may impose this remedy only where assets are wasted or dissipated, fraud exists, or assets must be preserved. Hankin v. Hankin, 493 A.2d 675, 677-78 (Pa. 1985). A court must not appoint a receiver when it will cause irreparable injury to the rights and interests of others, will result in greater injury than if no receiver was appointed, or will do no good. McDougal v. Huntington & Broad Top Mountain R.R. & Coal Co., 143 A. 574, 578 (Pa. 1928). Finally, if the case presents facts in which a court properly may consider appointing a receiver, the court should proceed with the appointment only when (1) the right to a receivership is clear, (2) irreparable damage otherwise will occur and there is no adequate remedy at law, (3) the rights of creditors and shareholders will not be interfered with, and (4) greater damage will result in the absence of a receiver. Tate, 190 A.2d at 321; McDougal, 143 A. at 578.

The Court will decline to appoint a receiver because Plaintiff has not shown he will be

irreparably damaged in the absence of a receiver or that money damages would be inadequate. Assuming all of his allegations are true, Plaintiff's legal claims against Defendants will continue to accrue and, if found liable, Defendants should be able to make Plaintiff whole. Perhaps anticipating this, Plaintiff throws out a host of possibilities that range from crippling liability for fraud to spoilation of evidence, but all of this amounts to nothing more than pure speculation that cannot support a conclusion of irreparable harm. Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 205 (3d Cir. 1990) (quoting ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 225 (3d Cir. 1987)); A.L.K. Corp. v. Columbia Pictures Indus., 440 F.2d 761, 764 (3d Cir. 1971); Sovereign Bank v. Harper, 674 A.2d 1085, 1093 (Pa. Super. Ct. 1996), appeal denied, 687 A.2d 379 (Pa. 1996).

Plaintiff attempts to address these shortcomings by claiming he is not required to make any showing of irreparable harm because he seeks equitable relief provided for by statute, and he apparently believes the coincidence of his requested relief and its statutory authority automatically excuses the irreparable harm requirement. To be sure, irreparable harm is presumed and need not be proven when the authority for the injunction is the Constitution or a statutory provision, often part of an enforcement scheme, that seeks to prevent harm to the public. See, e.g., Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 803 (3d Cir. 1989) (relying on and citing Government of Virgin Islands v. Virgin Islands Paving, 714 F.2d 283, 286 (3d Cir. 1983) (stating that when a statute explicitly or implicitly contains a finding that a violation of it will harm the public, a court may not require a showing of irreparable harm)); Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 453 (9th Cir. 1983) (involving a statutory enforcement scheme); Commodity Futures Trading Comm. v. Muller, 570

F.2d 1296, 1300 (5th Cir. 1978) (same); Commodity Futures Trading Comm. v. British Am. Commodity Options Corp., 560 F.2d 135, 141 (2d Cir. 1977) (same), cert. denied, 438 U.S. 905 (1978); Apollomedia Corp. v. Reno, 19 F. Supp. 2d 1081, 1088 (N.D. Cal. 1998) (Hawkins, Circuit Judge) (finding a strong presumption of irreparable injury exists in cases involving the infringement of First Amendment rights). Even the case on which Plaintiff heavily relies, Bosworth v. Ehreneich, 823 F. Supp. 1175 (D.N.J. 1993), concluded the injunction it granted was appropriate only when it served the public interest, id. at 1182-83. In this case, however, no public interest is invoked, a fact that Plaintiff readily admits. (Pl.'s Mem. Supp. Application For Appointment Of A Receiver, at 10.) Further, Pennsylvania law has developed a clear test to determine whether a receiver properly is appointed, and it makes no sense to the Court that certain elements of this test, consistently applied over the last seventy years, can be circumvented in the manner advocated by Plaintiff. In contrast to the situation here, none of the statutes in the cases cited above were accompanied by a test like Pennsylvania's. This even includes Bosworth, in which the Illinois legislature furnished situations in which courts could appoint receivers, but did not establish a test to determine when those appointments were warranted. See Bosworth, 823 F. Supp. at 1181. Accordingly, Plaintiff cannot avoid showing irreparable harm.

Finally counseling against appointing a receiver are the severe ramifications a receivership would visit on the company. As the court in Tate noted, an "appointment is a distress signal, and is immediately followed by lowering or financial credit and a general readjustment." Tate, 143 A. at 578. Based on these hardships, the court in Tate recommended that courts appoint receivers only when presented with actions that, if continued, ordinarily would be fatal to corporate life. Id. at 577-78. This is not such a case, and Plaintiff's request is

denied.

Much of this reasoning applies to Plaintiff's requests for injunctive relief. As discussed above, Plaintiff has failed to show he will be harmed irreparably, or that his legal remedies will be inadequate. Plaintiff therefore has failed to show he is entitled to injunctive relief, see Sovereign Bank, 674 A.2d at 1091, and his requests are denied. Finally, in light of the staying of these proceedings pending arbitration, the Court will dismiss Defendants' Motion to Dismiss (Document 2) and Plaintiff's Motion to Disqualify Mattioni Ltd. (Document No. 6) without prejudice.

An Order follows.

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MELVYN P. SALUCK	:	CIVIL ACTION
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STEVEN ROSNER, HEAVEN SENT,	:	
LTD. and CATHY ROSNER, jointly,	:	
severally, and in the alternative	:	NO. 98-CV-5718

O R D E R

AND NOW this 5th day of January, 1999, upon consideration of Defendants' Motion to Stay the Proceedings, Plaintiff's Motion for Appointment of A Receiver, Plaintiff's Motion for Disqualification of Mattioni Ltd., and the responses thereto, it is hereby **ORDERED**:

1. Defendants' Motion To Stay The Proceedings (Doc. No. 2) is **GRANTED**;

2. Plaintiff's Motion For Appointment Of A Receiver (Doc. No. 5) is **DENIED**;

3. Plaintiff's requests for injunctive relief stated in the Complaint and in his Motion For Appointment Of A Receiver are **DENIED**;

4. Defendants' Motion To Dismiss is **DISMISSED WITHOUT PREJUDICE**;

5. Plaintiff's Motion For Disqualification Of Mattioni Ltd. (Doc. No. 6) is **DISMISSED WITHOUT PREJUDICE**; and

6. For statistical purposes this case is placed in suspense pending the outcome of arbitration; and

7. Defendants' counsel will report to the Court every ninety (90) days as to the status of the arbitration proceedings.

BY THE COURT:

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JAMES McGIRR KELLY, J.